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components separated by clay lenses. Mr. Noble's report concludes that due to the presence of the clay lenses and the high transmissivity of the aquifer, there is unlikely to be substantial effect to the stream flow caused by the withdrawal of water from the Applicant's well.

From the well log it was determined that the Applicant would only be drawing water from that portion of the aquifer below the clay lenses.

From the Proposal for Decision in the Matter of the Boone Applications it was determined that a subsurface water source must be closely (underlined for emphasis) inter-connected with a surface source and there must be no non-saturated intervening layers between the two sources for that subsurface source to be a part of the surface source.

The finding and conclusion of the Hearing Officer was and is that the source of supply in this Application is groundwater because the source is not closely inter-connected with the surface source due to the presence of the clay layers.

2. Comment No. 2 by Mr. Leaphart addresses the number of acres and the location of those acres to be irrigated under Application No. 22047-g41E. The Application is granted for those lands specified in the Application, not those lands that the Applicant testified to be irrigating.

3. Comment No. 2 by Mr. Waterman questions the procedure followed by the Hearing Officer in issuing the Proposal for Decision. The procedure followed was spelled out at the beginning of the hearing - there were no exceptions to the procedure stated at that time. No requests were made to the Hearing Officer to review the transcript or to submit briefs. Such requests are routinely granted by this Hearing Officer if and when they are made.

4. The Hearing Officer does not agree with Comment No. 3 by Mr. Waterman. The Proposal for Decision was based on the hearing record and on matters noticed at the request of the counsels for the Objectors in this matter. Further, Mr. Waterman failed to specify which portion (s) of the Proposal for Decision were not based on the record so a more exact response cannot be given here.

5. Regarding Comment Nos. 4 and 5 by Mr. Waterman; there is no requirement under Montana Water Law that an individual must own land to apply for a water right. Also, the appropriation of water without a water right is a misdemeanor and is subject to prosecution. Such a violation does not prohibit an individual from making application for a beneficial water use permit.

FINAL ORDER

1. Subject to the conditions and limitations listed below, Application for Beneficial Water Use Permit No. 22047-g41E by Edward K. Kyler is hereby granted to appropriate 2,000 gallons per minute not to exceed 621 acre-feet per annum of groundwater from a well located in the SW1/4 SW1/4 SW1/4 of Section 1, Township 4 North, Range 3 West, M.P.M., in Jefferson County, Montana. The water is to be diverted from April 15 to October 15, inclusive, of each year for new sprinkler irrigation on a total of 300 acres, more or less, in the N1/2 of Section 1, Township 4 North, Range 3 West, M.P.M., Jefferson County, Montana.

2. Provisional Permit No. 22047-g41E is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. The Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all the waters diverted including the period of time and shall submit said records to the Department upon request.

4. The well shall be so constructed that water is not wasted or allowed to contaminate other water supplies or sources.

5. The final completion of the well shall include an access port of at least 0.50 inch diameter, located so that

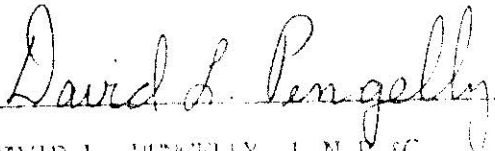
the static water level in the well can be adequately measured.

6. The issuance of the Provisional Permit by the Department in no way reduces the Permittee's liability for damages caused by the Permittee's exercise of this Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

NOTICE

The Hearing Examiner's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 30th day of December 19 80.


DAVID L. PENZELLY, L.N.R.&C.
HEARING EXAMINER